

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION**

BRIAN A., et al.	)	
	)	
Plaintiffs,	)	Civ. Act. No. 3:00-0445
	)	Judge Todd J. Campbell
v.	)	Magistrate Judge Joe B. Brown
	)	
BILL HASLAM, et al.	)	
	)	
Defendants.	)	

**MOTION FOR ACCESS TO INFORMATION REGARDING CHILD FATALITIES  
NECESSARY TO ENSURE COMPLIANCE WITH THE *BRIAN A. EXIT PLAN***

Pursuant to the October 2012 Modified Settlement Agreement and Exit Plan, Dkt. No. 444-1, Plaintiffs respectfully move this Court for an order requiring Defendants to immediately produce to Plaintiffs:

1. Federal and State statutorily mandated child fatality reviews for both class-member children who died during 2011 and 2012 and non-class-member children with a prior history of contact with the Department who died during 2011 and 2012;
2. All remaining documents regarding DCS internal reviews concerning class-member children who died during 2011 and 2012; and
3. DCS internal reviews concerning non-class-member children with a prior history of contact with the Department who died during 2011 and 2012.

In support of this Motion, Plaintiffs rely on their Memorandum of Law and the Declaration of Ira Lustbader, filed contemporaneously herewith.

DATED:       January 10, 2013  
  
                  Nashville, TN

Respectfully submitted,

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# EXHIBIT A

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION**

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Plaintiffs,	)	Civ. Act. No. 3:00-0445
	)	Judge Todd J. Campbell
v.	)	Magistrate Judge Joe B. Brown
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Defendants.	)	
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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR  
ACCESS TO INFORMATION REGARDING CHILD FATALITIES NECESSARY TO  
ENSURE COMPLIANCE WITH THE *BRIAN A.* EXIT PLAN**

Plaintiffs submit this Memorandum of Law in support of their Motion for Access to Information Regarding Child Fatalities Necessary to Ensure Compliance with the *Brian A.* Exit Plan ("Motion"). For the reasons set forth below and in the Motion, Plaintiffs respectfully request that the Court grant the Motion and order Defendants to immediately produce to Plaintiffs: (1) Federal and State statutorily-mandated child fatality reviews for both class-member children who died during 2011 and 2012 and non-class-member children with a prior history of contact with the Department who died during 2011 and 2012; (2) All remaining documents regarding DCS internal reviews concerning class-member children who died during 2011 and 2012; and (3) DCS internal reviews concerning non-class-member children with a prior history of contact with the Department who died during 2011 and 2012.

## **PRELIMINARY STATEMENT**

This Motion concerns Plaintiffs' good faith request for specific documents concerning child fatalities that are necessary to ensure compliance with the October 2012 Modified Settlement Agreement and Exit Plan ("Exit Plan"). Specifically, Plaintiffs seek:

1. Federal and State statutorily-mandated child fatality reviews for both class-member children who died during 2011 and 2012 and non-class-member children with a prior history of contact with the Department who died during 2011 and 2012;
2. All remaining documents regarding DCS internal reviews concerning class-member children who died during 2011 and 2012; and
3. DCS internal reviews concerning non-class-member children with a prior history of contact with the Department who died during 2011 and 2012.

First, Plaintiffs have a good faith belief that serious problems concerning child fatality investigations may be putting children at risk of harm. In 2011 and 2012, at least 57 child fatalities in Tennessee included children in DCS custody or children with a prior history with DCS. Plaintiffs do not question Defendants' good faith belief that child fatalities are of paramount concern and that a robust child fatality process is necessary to protect children and to remedy any systemic, custom or policy problems that may be placing children at risk of harm, including any deficiencies in the fatality review process itself. However, the extremely limited documents produced by Defendants thus far reveal, at a minimum, a fatality review process that may be putting children at risk of harm.

Defendants have produced only 17 pages of DCS internal reviews and short review summaries regarding deaths of class-member children, and grossly superficial summaries regarding the deaths of non-class-member children who had a history of contact with the Department. The internal review documents are grossly incomplete and do not contain consistent types of information, and some reveal clear safety concerns. For example, one "Child

Fatality Service Review” form states that there were two deaths in a foster home within six months, but does not provide any detail regarding the potential implications of this obviously concerning fact. Further, key questions are left blank, including whether there was any prior CPS involvement and whether appropriate DCS/ private provider policies and procedures were followed to complete the investigation. Two of the people who signed this document noted that they “defer pending review of medical records.” This suggests that the DCS review of this fatality was not complete, yet no further information is provided.

The summaries of fatality investigations involving non-class-member children with a history of DCS involvement are so superficial that it is impossible to determine what transpired in those cases, if any practices put children at risk, or whether the circumstances required removal of the children and placement into DCS custody. For example, one of the summaries states that there was an open on-going investigation at the time of the fatality, the family had a history of manufacturing methamphetamine, and the home was found to be without electricity or water. The limited information provided thus far raises a good faith concern about the quality of these reviews.

Second, Plaintiffs are clearly entitled to the requested statutorily-mandated fatality review documents under unambiguous provisions in the Exit Plan and under Federal and State law. The Exit Plan explicitly allows Plaintiffs access to any information necessary to ensure compliance with its provisions. The quality of investigations of abuse and neglect of children in DCS custody is a key deliverable under the Exit Plan, and the parties have memorialized their intent in a Letter Agreement that information regarding investigations of child abuse and neglect concerning children not in DCS custody is relevant to Defendants’ compliance with the requirements of the Exit Plan. Also, the Exit Plan requires that, as “child welfare decision-

makers,” DCS staff and managers must be able to make informed decisions as to whether children can be maintained safely in their homes or if they need to be removed.

Defendants refuse to provide the statutorily-mandated reviews because, they argue, the documents are confidential under state law; however, the Federal Child Abuse Prevention and Treatment Act (“CAPTA”) explicitly requires that states make findings and information regarding child fatalities and near fatalities public, and the Tennessee law implementing that CAPTA requirement *requires* the release of fatality documents. Defendants also apparently refuse to provide these documents because of the involvement of the Department of Health (“DOH”) in conducting those reviews. The notion that the involvement of the DOH in the statutorily-mandated fatality reviews renders them out of the possession, custody, or control of the Governor and DCS Commissioner – the official capacity Defendants in this litigation – is both incorrect and simply not credible. Furthermore, if the *Brian A.* Defendants are not actively reviewing and acting on statutorily-mandated fatality review investigation documents, that in and of itself raises a serious systemic safety concern for class members.

Third, Plaintiffs are clearly entitled to DCS internal fatality reviews under the Exit Plan, for both class-member children and those with a prior history with DCS. As with the statutorily-mandated reviews, the DCS internal reviews provide information relevant to whether Defendants are complying with specific requirements of the Exit Plan. Defendants again argue, without merit, that the reviews for non-class-member children with a prior history of contact with DCS are confidential under state statute. However, even assuming that all or part of these documents are confidential, they still must be disclosed to Plaintiffs in this federal case, because the documents are relevant to ensuring compliance with and enforcement of the Exit Plan. This

Court could simply require a protective order (as was done in the initial phases of this litigation) to address any confidentiality concerns.

Importantly, Plaintiffs are not at this time asserting noncompliance and seeking court-imposed remedies, nor are Plaintiffs seeking any broad systematic discovery of the entire class that would create any production burden on Defendants. Rather, with a clear good faith basis of potential safety concerns involving child fatalities, Plaintiffs seek a discrete set of documents that are plainly relevant to the compliance and enforcement of the Exit Plan. As set forth fully below, Plaintiffs' Motion should be granted in its entirety.

### **STATEMENT OF FACTS**

At an in-person meeting in Nashville on September 5, 2012, the parties and the Technical Assistance Committee ("TAC") discussed system performance issues, including recent child fatalities in Tennessee. (Decl. of Ira Lustbader in Supp. of Pls.' Mem. of Law in Supp. of Their Mot. for Access to Info. Regarding Child Fatalities Nec. to Ensure Compliance with the *Brian A.* Exit Plan ("Lustbader Decl.") ¶ 2 (filed concurrently)). During that meeting, Plaintiffs requested, and the Commissioner and her staff agreed to provide, records regarding children who died while in DCS custody or with a history of contact with DCS, including any federal or state statutorily-mandated reviews and any DCS internal reviews. (*Id.*). The documents were not produced prior to the parties' subsequent in-person meeting on October 24, 2012, so Plaintiffs followed up at that meeting and the Commissioner and her team again agreed to provide the documents. (Lustbader Decl. ¶ 3.).

As of November 12, 2012, no documents had been produced, so Plaintiffs sent a letter to Defendants requesting that the documents be provided for deaths that occurred during 2011 and 2012 by November 16, 2012. (Ex. A to Lustbader Decl.). Defendants responded by email on



November 13, 2012, stating that they would provide “summaries” on child deaths from 2012 within a week, and that information for calendar year 2011 would take longer. (Ex. B to Lustbader Decl.). Defendants also stated that, if Plaintiffs were requesting the actual records of class members, the parties could discuss that further. (*Id.*).

Plaintiffs responded via email that same day, clarifying that they were not seeking “summaries,” but rather were “seeking the full evaluations and reports that were conducted under federal and state statutes, as well as any additional evaluations or reports conducted internally at DCS.” (Ex. C to Lustbader Decl.). Plaintiffs also clarified that they were requesting case files for *Brian A.* class members who died while in State custody. (*Id.*).

On November 19, 2012, Defendants sent a letter (“November 19 Letter”) to Plaintiffs stating that they would provide “summaries” regarding the deaths of children who were known to DCS but were not class members when they died. (Ex. D to Lustbader Decl.). Defendants also stated that they would provide case files for children who were class members when they died to the TAC, and that Plaintiffs could obtain those files from the TAC. (*Id.*). Defendants’ November 19 Letter failed to mention the statutorily-mandated reviews and DCS internal reviews that Plaintiffs had requested. (*Id.*). On November 21, 2012, Defendants sent an email to Plaintiffs, (Ex. E to Lustbader Decl.), enclosing summaries regarding the deaths of children between January and June 2012 who were known to DCS but were not class members when they died, (Ex. F to Lustbader Decl., filed under seal).

In a letter dated November 26, 2012, Plaintiffs agreed to receive the case files of children who died while in State custody through the TAC, and reiterated the various categories of documents they had requested that had not been provided and had been ignored by Defendants in their recent correspondence, specifically:

1. Federal and State statutorily-mandated reviews regarding deaths of class members and non-class-members with a history of contact with DCS;
2. DCS internal reviews regarding deaths of class members; and
3. DCS internal reviews regarding deaths of children who were known to DCS but were not class members when they died.

(Ex. G to Lustbader Decl.). Plaintiffs requested that the remaining documents be provided promptly. (*Id.*).

Defendants responded on December 5, 2012 with regard to each of the categories of outstanding documents as follows:

1. With regard to Federal and State statutorily-mandated reviews concerning deaths of class members, Defendants stated that those reviews are conducted by the DOH and are confidential by statute, and that they would inform Plaintiffs of the DOH's decision with regard to releasing the reviews. With regard to Federal and State statutorily-mandated reviews regarding deaths of children who were known to DCS but were not class members when they died, Defendants stated that they were prohibited from providing these documents to Plaintiffs because they are confidential by statute. (Ex. H to Lustbader Decl.).
2. With regard to DCS internal reviews concerning deaths of class members, Defendants produced only 17 pages of documents, which consisted of a very incomplete set of reviews. (Ex. I to Lustbader Decl., filed under seal.). Defendants stated that they had diligently searched for relevant documents and would provide any additional documents they discovered. (Ex. H to Lustbader Decl.).
3. With regard to DCS internal reviews concerning deaths of children who were known to DCS but were not class members when they died, Defendants stated that they were prohibited from providing these documents to Plaintiffs because they are confidential by statute. (Ex. H to Lustbader Decl.). Instead, Defendants produced more "summaries" of these cases for children who died in 2011 and from July and August 2012. (Ex. J to Lustbader Decl., filed under seal).

On December 18, 2012, Plaintiffs received from the TAC the case files of the ten class member children who died while in DCS custody during 2011 and 2012. (Lustbader Decl. ¶ 11).

On December 19, 2012, Plaintiffs sent a letter ("December 19 Letter") to Defendants pointing out that the DCS internal reviews regarding deaths of class members that had been

produced were incomplete and requesting the remainder of those reviews. (Ex. K to Lustbader Decl.). In order to address Defendants' confidentiality concerns with regard to the remaining categories of documents, Plaintiffs proposed a protective order designating any documents that were in fact confidential, preventing their re-disclosure beyond the parties and their counsel, and preventing their use for any purpose other than this litigation. (*Id.*). Plaintiffs attached a draft protective order to their letter for Defendants' comments. (*Id.*).

Defendants responded by letter on December 28, 2012, stating that they were attempting to locate additional DCS internal reviews for class-member children, and requesting that Plaintiffs allow them until January 9, 2013 to consult with the DOH and the Governor's Office to arrive at a position as to Plaintiffs' request for the statutory-mandated reviews regarding those children. (Ex. L to Lustbader Decl.). With regard to children who were known to DCS but were not class members when they died, Defendants asked Plaintiffs to articulate the authority that allows access to these documents. (*Id.*).

On January 3, 2012, Plaintiffs sent a letter ("January 3 Letter") to Defendants, (Ex. M to Lustbader Decl.), enclosing the parties' Letter Agreement, dated November 10, 2010, memorializing the parties' intent that information regarding various aspects of DCS's Child Protective Services ("CPS") and Multiple Response System ("MRS"), which investigate and assess allegations of abuse and neglect for children who are not in State custody, are within the ambit of TAC monitoring and are thus relevant to *Brian A.* (Ex. N to Lustbader Decl.). This Letter Agreement states, in pertinent part:

"The TAC shall continue to report on all subject areas that it has previously reported on in this action." The parties agree that the subject areas on which the TAC has thus far reported in this action include, among other things:

- Implementation of the Multiple Response System ("MRS");

- Timeliness of the MRS process;
- Adequacy of CPS/MRS staffing, including but not limited to CPS/MRS caseloads;
- Evaluation of the effectiveness and safety of MRS; and
- Evaluation of the use of safety plans/immediate protection agreements.

(*Id.*) (quoting the 2010 Modified Settlement Agreement and Exit Plan, Dkt. No. 411, at 28).

Plaintiffs' January 3 Letter also reiterated their position that the protective order they proposed in their December 19 Letter remedied any potential confidentiality concern regarding documents related to children who were known to DCS but were not class members when they died. (Ex. M to Lustbader Decl.). Plaintiffs requested that Defendants inform them of their final position as to each of the outstanding categories of documents by January 9, 2013, as they would need to seek Court relief if the disclosure matter was not resolved. (*Id.*).

On January 9, 2013 Defendants sent a letter to Plaintiffs stating their final position that they will not "voluntarily" produce statutorily-mandated fatality reviews for either class member children or non-class-member children with a history of contact with the Department, stating that those reviews are confidential. (Ex. O to Lustbader Decl.). Defendants also stated that they would not produce DCS internal fatality reviews regarding non-class-member children with a history of contact with the Department, stating that those reviews are also confidential. (*Id.*).

Having fully exhausted good faith efforts to resolve this issue with Defendants without Court intervention, Plaintiffs have filed the instant Motion.

## **ARGUMENT**

### **I. Plaintiffs Have a Good Faith Belief That Serious Problems with DCS Fatality Investigations May Be Putting Children at Risk of Harm**

Without question, the parties are in agreement over the seriousness of any child fatalities

and the good faith desire to identify any systemic, custom, or policy issues revealed in investigations of child fatalities that might be compromising child safety, including the quality of the investigations themselves. In 2011 and 2012, there were at least 57 child fatalities in Tennessee that involved either class-member children or children with a prior history with DCS. However, thus far, Defendants have produced only 17 pages of DCS internal reviews and short review summaries regarding deaths of class-member children, and only very superficial summaries regarding the deaths of non-class-member children who had a history of contact with the Department. Those documents give rise to serious concerns regarding DCS's processes for reviewing child fatalities. Plaintiffs are not alleging noncompliance at this time, but rather are requesting the opportunity for very limited, targeted discovery to determine whether, in fact, noncompliance is occurring.

The 17 pages of DCS internal reviews and short review summaries regarding deaths of class-member children are very incomplete and raise serious questions regarding DCS's review processes.<sup>1</sup> (Ex. I to Lustbader Decl.). As an initial matter, DCS has produced very inconsistent documents for each of the ten children who died while in DCS custody during 2011 and 2012. For four of the ten children, short summaries of their cases have been provided, along with DCS internal review forms that are either incomplete or illegible. The same forms are not consistently used for these children—some are titled “Child Fatality Service Review,” and others contain no title, but say “Draft Copy for Verification Purposes Only.” For another four of the ten children, short summaries of their cases have been provided, but no internal review forms have been

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<sup>1</sup> Plaintiffs are in the process of reviewing the case files that DCS has provided through the TAC for the ten children who died while in DCS custody in 2011 and 2012. While those files provide more information about the circumstances surrounding those fatalities, they do not substitute for the full DCS internal and statutorily-mandated reviews, which should contain the results of an organized review process as well as findings regarding case practice. The quality of the internal and statutorily-mandated reviews is itself a serious safety issue.

provided. For two of the ten children, no documents have been provided at all. It is impossible to tell based on this production what the DCS internal fatality review process consists of, and what review was actually undertaken as to each of the ten fatalities at issue.

To the extent that some review forms are provided, those forms raise serious concerns about DCS's fatality review practice, for example:

- One of the "Child Fatality Service Review" forms states that there were two deaths in a foster home within six months, but does not provide any detail regarding the potential implications of this obviously concerning fact. Further, key questions are left blank, including whether there was any prior CPS involvement and whether appropriate DCS/private provider policy and procedure were followed to complete the investigation. Two of the people who signed this document noted that they "defer pending review of medical records." This suggests that the DCS review of this fatality was not complete, yet no further information is provided. (Ex. I to Lustbader Decl., at 4-6).
- On another "Child Fatality Service Review" form, key questions are left blank, including what type of services were currently or previously provided, what type of staff training needs were identified during the investigation, and whether appropriate DCS/Private Provider policy and procedures were followed to complete the investigation. Further, two of the people who signed this form noted that they "defer pending record review," indicating that the DCS review of this fatality was not complete, but no other review documents have been provided. (Ex. I to Lustbader Decl., at 7-9).
- One of the forms that does not have a title but states "Draft Copy for Verification Purposes Only" notes in the fatality section of the document that there was a drug exposed infant; however, the form also states that the cause of death was unknown and that an autopsy was pending. Regarding the history with this family, the document states "see back," however there is no back of the document provided. The second page is completely illegible, and there is no information provided regarding the outcome or the quality of the investigation, nor any recommendations for further review or follow up. This document is not signed by anyone. (Ex. I to Lustbader Decl., at 14-15).

In addition, the "summaries" provided by DCS regarding the deaths of non-class-member children who had a history of contact with the Department are so superficial that it is impossible for Plaintiffs to evaluate DCS practice. (Exs. F and J to Lustbader Decl., filed under seal). For example, for a number of children, the summaries state that the child's "prior involvement [with DCS] was not pertinent to the fatality" and no information regarding that prior involvement is

provided. (Ex. F to Lustbader Decl., at 4). Further, for some children, even the limited information provided regarding their prior involvement with DCS gives rise to concerns that the children may have been inappropriately maintained in their homes instead of taken into DCS custody. For example, for one child, an infant who died at home, the summary states:

There was an open on-going investigation at the time of the fatality. The family has a history of manufacturing meth, and the home was found to be without electricity or water. The home was also reported to be a mess, with the entire family sleeping in the living room. The family was able to utilize family supports and stay with relatives.

(Ex. J to Lustbader Decl., at 15).

In sum, both the DCS internal reviews and review summaries regarding deaths of class-member children, and the summaries regarding the deaths of non-class-member children who had a history of contact with the Department, give rise to serious practice concerns that necessitate Plaintiffs' access to the requested documents so that they may assess whether DCS is complying with its obligations under the Exit Plan.

## **II. Plaintiffs are Clearly Entitled to the Requested Statutory Fatality Reviews Under the Exit Plan and Federal and State Law**

Without question, under the Exit Plan, Plaintiffs are unambiguously entitled to any information necessary to ensure compliance with the requirements of *Brian A.*:

Plaintiffs shall have access from the TAC to all information made available to the TAC, *and to all other information necessary to ensure compliance and enforcement of this agreement.* If Plaintiffs become aware of information related to possible non-compliance that they wish to investigate, Plaintiffs shall notify the TAC,<sup>2</sup> *without any limitation to Plaintiffs' right to access all information necessary to ensure compliance and enforcement of this agreement.*

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<sup>2</sup> The TAC has been included on all communication between the parties with regard to Plaintiffs' document requests.

(Dkt. No. 444-1, at 28 (emphasis added)). The documents requested by Plaintiffs regarding child fatalities are plainly relevant to whether or not DCS is complying with the requirements of the Exit Plan. As to children in the *Brian A.* class, the Exit Plan requires:

DCS's system for receiving, screening and investigating reports of child abuse and neglect for foster children in state custody shall be adequately staffed and all reports of abuse or neglect of class members shall be investigated in the manner and within the time frame provided by law.

(Dkt. No. 444-1, at 7). Certainly, this provision covers investigations in which a child in State custody has died. The fatality reviews provide relevant information regarding whether allegations of abuse or neglect are being investigated in the manner and within the time frame required by law.

With regard to non-class-member children who had a history of contact with DCS prior to their deaths, the parties anticipated and documented their intent that safety practices regarding these children are relevant to compliance with the *Brian A.* Exit Plan. The parties memorialized this in a Letter Agreement, dated November 10, 2010, which states:

Section XV.A of the Exit Plan, concerning the role of the Technical Assistance Committee ("TAC") as independent Monitor, states that: "The TAC shall continue to report on all subject areas that it has previously reported on in this action." The parties agree that the subject areas on which the TAC has thus far reported in this action include, among other things:

- Implementation of the Multiple Response System ("MRS");
- Timeliness of the MRS process;
- Adequacy of CPS/MRS staffing, including but not limited to CPS/MRS caseloads;
- Evaluation of the effectiveness and safety of MRS; and
- Evaluation of the use of safety plans/immediate protection agreements.



(Ex. N to Lustbader Decl.) (quoting the 2010 Modified Settlement Agreement and Exit Plan, Dkt. No. 411, at 28). Certainly this agreement covers CPS/MRS cases in which a child has died. Among other things, the fatality reviews provide relevant information regarding whether CPS/MRS are adequately staffed, the safety of MRS, and the use of safety plans and immediate protection agreements.<sup>3</sup>

Defendants have refused to provide Plaintiffs with any statutorily-mandated fatality reviews, stating that those reviews will not be disclosed “voluntarily” and that they are confidential under state law.<sup>4</sup> Defendants have not identified what statute or statutes they are relying upon; however, their argument fails because it is clear as a matter of law that public disclosure of the statutory reviews Plaintiffs have requested is actually mandatory. Federal and State law specifically require that these statutory reviews be disclosed to the public. CAPTA

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<sup>3</sup> In addition, the 2012 Exit Plan requires that “child welfare decision-makers must have the professional capacity to make determinations as to when making efforts to preserve the biological family, or leaving the child with that family, is neither safe for the child nor likely to lead to an appropriate result for the child.” (Dkt. No. 444-1, at 3-4). This provision of the Exit Plan is independently enforceable and this Court has previously found that “child welfare decision-makers” includes juvenile court judges. (Dkt. No. 342, at 4-5). Without question, DCS managers are “child welfare decision-makers” under the plain meaning of this provision and fatality reviews are plainly relevant to meeting its requirements.

<sup>4</sup> Defendants also state in their January 9 Letter that DCS does not have access to the requested statutorily-mandated fatality reviews since they are conducted by the Department of Health. (Ex. O to Lustbader Decl.). This assertion is without merit, since the requested fatality reviews were conducted by the State of Tennessee regarding children who died while in DCS custody or while known to the Department. Both the DCS Commissioner and the Governor are official capacity defendants in this case, and there can be no question that the requested documents are in their possession, custody and control. Indeed, it would belie common sense that the *Brian A.* Defendants could not access fatality reviews concerning children who died while in DCS custody or with a prior history of DCS involvement. Additionally, the Exit Plan expressly states: “Any state agency responsible for the care, protection, and/or supervision of plaintiff class members shall be bound by the provisions of this agreement,” (Dkt. No. 444-1, at 3), which brings the DOH under the ambit of the Exit Plan and requires it to produce the requested documents.

requires that, in order for a state child welfare system to receive federal funding, a State Plan submitted under CAPTA must describe:

the activities that the State will carry out using amounts received under the grant to achieve the objectives of this subchapter, including . . . an assurance . . . that the State has in effect and is enforcing a State law, or has in effect and is operating a statewide program, relating to child abuse and neglect that includes . . . provisions which allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality . . . .”

42 U.S.C.A. §5106a(b)(2)(B)(x). In compliance with CAPTA, Tennessee law specifically excepts information regarding child fatalities from those DCS documents that are designated confidential. The statute states: “The Department *shall* release information in the following circumstances . . . . To provide for the public disclosure of information about any case that results in a child fatality or near fatality in compliance with [CAPTA].” T.C.A. §§ 37-5-107(c), 37-5-107(c)(4) (emphasis added).

Accordingly, public disclosure of the requested fatality review documents is required. However, even if the Court were to find that all or part of the requested statutorily-mandated reviews are confidential under state law, that finding would not prevent disclosure of the requested documents to Plaintiffs in this litigation, because the documents are plainly relevant to determining whether Defendants are complying with the requirements of the *Brian A. Exit Plan*.<sup>5</sup> As one federal district court in Tennessee recently found, state law preventing the public disclosure of certain information sought from Tennessee government agencies, including DCS, did not prevent disclosure of the information in the federal case, since “[a]ll of this data contains highly relevant information on the Defendants' violation of federal law and Plaintiffs' federal

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<sup>5</sup> In an abundance of caution, Plaintiffs have filed any fatality documents that have been produced thus far under seal.

constitutional rights.” *See John B. v. Goetz*, 3:98-0168, 2010 WL 8754110 at \*99 (M.D. Tenn. January 28, 2010).

Further, any confidentiality concerns (if any exist, which Plaintiffs dispute) can be cured by an appropriate protective order, such as the one proposed by Plaintiffs in their December 19 Letter. *Id.*; (Ex. K to Lustbader Decl.). In fact, a protective order was entered at an early stage of this litigation regarding the case files of the Named Plaintiffs, (Dkt. No. 25), and addressed any confidentiality concerns with aspects of those files. Even if a protective order is needed for some aspects of the requested documents, Defendants should be directed to immediately produce the requested statutorily-mandated fatality reviews to Plaintiffs.

### **III. Plaintiffs are Clearly Entitled to the Requested DCS Internal Fatality Reviews Under the Exit Plan**

Defendants have agreed to provide Plaintiffs with DCS internal reviews regarding class members who died while in State custody, however, as discussed in detail above, Defendants provided on December 5, 2012 only 17 pages of very incomplete review documents. Defendants stated that they were searching for additional documents, but no additional documents have been produced and Defendants have not stated whether their production is complete. Defendants should be ordered to immediately produce any remaining documents regarding DCS internal reviews of class member fatalities, or to confirm that no additional documents exist.

Defendants have stated that they will not produce DCS internal reviews regarding non-class-member children who had a history of contact with DCS when they died because such documents are confidential. Again, Defendants do not cite any statutory authority for this assertion of confidentiality and, in any event, even if the Court finds that these documents are confidential under state law, that finding cannot prevent disclosure of the documents to Plaintiffs in this case, since the documents are plainly relevant to whether Defendants are complying with

the requirements of the Exit Plan. As explained above, the parties anticipated and documented their intent that safety practices regarding non-class-member children who have had contact with the Department are relevant to compliance with the *Brian A.* Exit Plan in their Letter Agreement. (Ex. N to Lustbader Decl.). Among the issues the parties stated were relevant were the adequacy of CPS/MRS staffing, the effectiveness and safety of MRS and the adequacy of safety plans and immediate protection agreements. (*Id.* at 2.). By definition, DCS internal fatality reviews of non-class-member children with a history of contact with the Department provide information about these issues.

In addition, the circumstances surrounding fatalities of children who were not in State custody at the time of their deaths, but who had a prior history of contact with DCS, are relevant to the possibility that Defendants have customs and policies that are systematically thwarting and denying *Brian A.* class membership and are thereby denying those children the protections of the *Brian A.* Exit Plan. While Plaintiffs do not assert such noncompliance at this time, Defendants would be in violation of the Exit Plan if they were engaged in a pattern and practice of frustrating its purposes. Plaintiffs are seeking, in good faith, information relevant to determining whether such a problem exists. A federal district court in Georgia in a case with a similar consent decree in place granted Plaintiffs' request for discovery related to children who were not in State custody but who had a history of contact with the Georgia child welfare system. *Kenny A. v. Perdue*, No. 1:02-CV-1686-MHS, slip op. at 5 (N.D.Ga. May 20, 2010), Ex. P to Lustbader Decl. The Court held that the possibility that children were being kept out of foster care custody inappropriately at least entitled Plaintiffs to discovery on the issue so that they could determine whether to bring enforcement proceedings. *Id.* In addition, the court found that the limited

discovery requested (although broader than the discovery sought here) would not place an undue burden on Defendants and that this counseled in favor of granting Plaintiffs' motion. *Id.*

The requested DCS internal reviews of fatalities of children who were not class members but who had a history of prior contact with the Department at the time of their deaths are clearly relevant to whether Defendants are complying with the requirements of the *Brian A. Exit Plan*. Defendants should be ordered to produce these documents to Plaintiffs immediately, with a protective order in place, if deemed necessary by the Court, in order to address any confidentiality concerns.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the Motion and order Defendants to immediately produce to Plaintiffs: (1) Federal and State statutorily-mandated child fatality reviews for both class-member children who died during 2011 and 2012 and non-class-member children with a prior history of contact with the Department who died during 2011 and 2012; (2) All remaining documents regarding DCS internal reviews concerning class-member children who died during 2011 and 2012; (3) DCS internal reviews concerning non-class-member children with a prior history of contact with the Department who died during 2011 and 2012; and to order any such other relief as this Court may deem appropriate.

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Respectfully submitted,

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